Kluwer Arbitration Blog

Arbitration In Dubai After Decree 34 of 2021: It Has Wings, But Will It Fly?

Habib Al Mulla (Baker McKenzie Habib Al Mulla) and Karen Seif (Sorbonne University Abu Dhabi) · Sunday, November 14th, 2021

Dubai's Decree 34 of 2021 ("Decree") and its appended statute on DIAC ("Statute") were promulgated on 14 September 2021. The Decree consolidates the local arbitration centres under a new-and-improved DIAC ("DIAC 2.0"), and notably abolishes the DIFC Arbitration Institute ("DIFC-LCIA"), marking the beginning of a new era for arbitration in Dubai.

From the outset, DIAC 2.0 will face challenges related to the transition. Whether the new arbitration regime improves the former landscape largely will be determined by the extent to which DIAC 2.0 adopts a forward-looking approach in interpreting the Decree, as well as its ability to mobilize stakeholders (i.e., the Dubai Courts and the DIFC Courts) to coordinate their actions. This post will provide the background of the Decree, identify potential challenges under the Decree's transitional provisions and their solutions, and analyze the new position of the DIFC Courts as Dubai's default arbitration jurisdiction.

I. Landscaping Dubai's arbitration terrain: Background story

The starting point for the Decree was in 2016, during Dr. Habib Al Mulla's tenure as DIAC's chair. Dr. Al Mulla's vision for a single arbitration centre – one under the (mainland) Dubai brand, that would promote Dubai as an arbitration hub – was presented to the Dubai government.

Despite no action being taken at the time, the recommendation was revived by Dubai government authorities in the context of the recent comprehensive legal reforms (including notably the abolishment of limitations on foreign ownership of local companies under Federal Decree 26 of 2020 of 27 September 2020). In March 2021, Dr. Al Mulla was asked by the Dubai government to draft the original text of the Decree and Statute ("Proposal"). The Proposal is not public, and the reporting of its contents – which are not subject to any third-party proprietary rights – is based on Dr. Al Mulla's account.

The Decree differs from the original Proposal in four main aspects. Firstly, the Proposal was to abolish all existing arbitration centres – including DIAC – and start with a clean slate. Instead of a one-step merger, the Decree opts for a two-step approach that includes an acquisition of the abolished centres, and a comprehensive restructuring resulting in DIAC 2.0. Secondly, the Proposal was to seat DIAC 2.0 in the DIFC, not in mainland Dubai. Thirdly, in contrast to the

Decree's immediate effect, the Proposal provided that all three arbitration centres would continue to operate under their current structure during the six-month transition period. Finally, the Proposal did not include an arbitration court.

Although, as discussed below, the Decree falls short of being optimal, it is a significant step forward for Dubai's arbitration landscape and provides some comfort to non-Arabic speakers and common law practitioners that the spirit of the common law is strongly present – more than ever – under the new regime.

II. Challenges ahead: Upholding party autonomy while managing transition

The main focus of the Decree is upholding party autonomy. In that vein, it stipulates that arbitration agreements predating it remain valid, and that any proceedings that were underway when it was enacted may continue; only DIAC 2.0 would replace the abolished institutions in administering the arbitration.

The Decree expressly allows parties to amend their arbitration agreements, and agree to have their proceedings administered by an institution other than DIAC 2.0. In that case, tribunals may seek express consent from the parties – for example, in the terms of reference or a procedural order – regarding the modification of the arbitration institution to avoid any future concerns.

While the Decree attempts to validate the parties' prior contractual agreements, a number of issues remain unclear. Here, DIAC 2.0, in coordination with mainland Dubai Courts and the offshore DIFC Courts – where appropriate – should step in to fill the gaps.

The first question will be the impact on the parties' consent to arbitration. While it has been established in caselaw that the abolishment of an arbitration centre does not render the arbitration agreement inoperative in its essence (see for example *SAS ADB v. Société Reo Inductive Components AG*, Court of Appeal of Paris, 20 March 2012), disputes are expected as some parties may attempt to argue the invalidity of the arbitration agreement by calling into question their consent to arbitration. In addition, parties may disagree on how to proceed under the new regime; for example, with one party attempting to frustrate the arbitration by opposing administration by DIAC 2.0, but without selecting another institution.

Here, tribunals, the mainland Dubai Courts and the offshore DIFC Courts will play an important role in setting out the guidelines. It is particularly important to avoid conflicting judgments between the courts of Dubai. To that end, if – ahead of potential litigation – DIAC 2.0 succeeds in engaging the courts of Dubai in coordinating their views on jurisdiction regarding DIFC-LCIA arbitrations, such that the first judgments issued by each court reflect a unified front, this will provide assurance to anxious parties and discourage dilatory tactics.

Other issues require direct guidance from DIAC 2.0, such as the default arbitration rules. Although Article 6(b) provides that the rules of the abolished institutions continue to apply to ongoing arbitrations, Article 6(a) makes no provisions regarding institutional rules for future disputes. This raises the question of which rules – DIFC-LCIA or DIAC 2.0 – apply to future proceedings as a default.

In addition, for future arbitrations under Article 6 of the Decree, it is unclear whether the Rules of

DIAC 2.0 would allow parties to provide for DIAC arbitration under the rules of another institution. Here, further guidance from DIAC 2.0 is needed.

Furthermore, parties with ongoing DIFC-LCIA arbitrations would have paid fees to the DIFC-LCIA Centre. Under Article 5 of the Decree, these fees have been transferred to DIAC 2.0 (see a prior post on the Blog for a discussion of transition challenges related to different fees in DIAC and LCIA, as well as other potential issues). The issue of party funds is a concern for both parties and tribunals.

Establishing a simple protocol in a timely manner would build DIAC 2.0's credibility, and avoid any unnecessary issues, especially where the parties are in agreement on how to proceed. Drafting the protocol in consultation with the Dubai Courts and DIFC Courts will ensure that the protocol serves to guide, rather than to further confuse.

The protocol should describe the actions – if any – to be taken by the parties and tribunal. It is also important that information be provided on the process of obtaining parties' consent for the transfer of funds previously held by the DIFC-LCIA to DIAC 2.0, to alternative institutions or to the parties and tribunal directly, as well as a timeline. For future arbitrations, the protocol should address whether a clause providing for DIAC arbitration under the rules of another institution would be valid.

III. Default Dubai seat: Vote of confidence for the DIFC Courts and the common law system

The Statute makes the seat the determinative factor for court jurisdiction over the supervision of arbitration proceedings, as well as the execution and annulment of arbitral awards. It thus clarifies the delimitation regarding arbitration seats between the two different jurisdictions in Dubai: mainland Dubai and the DIFC.

Article 4 of the Statute stipulates that, when the arbitration agreement provides for arbitration in Dubai, the applicable law would be Federal Decree 6 of 2018 (the UAE arbitration law), and the Dubai Courts (mainland) would have jurisdiction over the arbitration. Likewise, when the arbitration agreement provides for arbitration in the DIFC, the DIFC arbitration law of 2008 would apply, and the offshore DIFC Courts would have jurisdiction over the arbitration. As for instances where parties fail to specify a seat in their arbitration agreement, the DIFC would be the default seat, and the DIFC arbitration law would apply.

The above provisions are adopted from the 2017 draft DIAC Rules. However, by including them in the Decree, the Dubai legislator endowed them with the force of law, which they would not have as DIAC-made rules. In light of this, it is expected that going forward, the Joint Tribunal ("JT") will update its position and shift the weight from the choice of institution (see for example Cassation No. 1/2018 (JT), where the JT found that DIFC Courts have jurisdiction to enforce a DIFC-LCIA award, where the seat was mainland Dubai and the applicable law was UAE civil law, discussed in a previous blog post), or the location of the assets subject of enforcement claim (see for example, Cassation No. 3/2017 (JT) and Cassation No. 1/2017(JT), both discussed in a previous blog post) to the choice of seat – or lack thereof.

The question of the impact on the conduit jurisdiction of the DIFC Courts also arises. Although there is no express provision on the interplay between non-DIFC awards (whether local or

international) and the DIFC Courts, adopting the default jurisdiction of DIFC Courts crowns the DIFC Courts as the ultimate authority on arbitration, and sends a strong signal to mainland Dubai Courts and the JT. While the JT has softened its approach recently, and appears open to a more equal distribution of jurisdiction between the two courts (see, for example, Cassation No. 8/2020 (JT)), it remains to be seen whether it would go so far as to expressly approve the conduit jurisdiction of DIFC Courts.

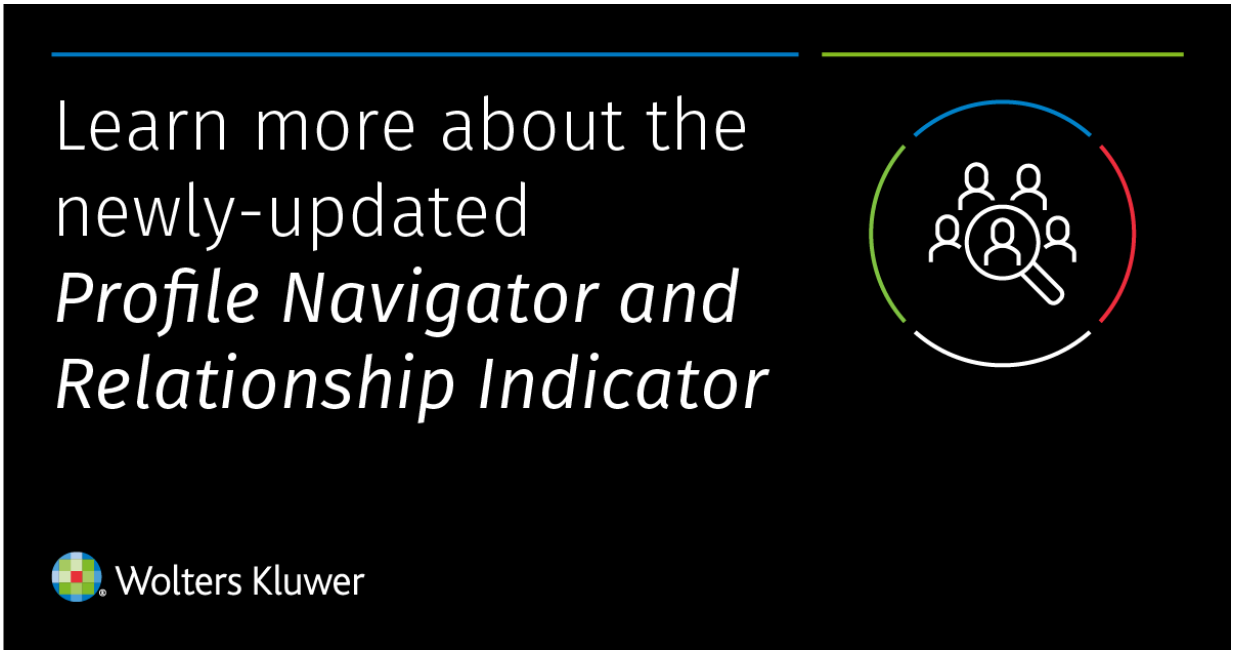
Finally, the question of how these provisions apply to arbitration agreements that precede the Decree remains outstanding. In the event of an arbitration clause that provides for DIAC arbitration without selecting a seat, the DIAC Rules of 2007 provide that the default seat is Dubai. Article 6 of the Decree appears to provide that DIAC Rules of 2007 will continue to apply to ongoing arbitrations and potentially to future arbitrations as well, while stipulating in Article 4 that the default seat is the DIFC. It remains to be seen which court will have jurisdiction in the event of a dispute over such a clause. Preemptive coordination between the various stakeholders – including Dubai Courts and DIFC Courts – would provide some welcome insight, and avoid a jurisdictional tug-of-war between the courts.

IV. Concluding remarks

DIAC 2.0 has all the markings of a world-class arbitration institute, and the flexibility to adopt any measures that will further its mission, but whether it will rise to the occasion remains to be seen. The challenges will be especially high over the next few months.

At the same time, DIAC 2.0 will have the support of the DIFC Courts and the onshore Dubai Courts, which stand to play an important role in facilitating the transition process for the parties, while signaling their endorsement of DIAC 2.0.

In the meantime, the arbitration world will be watching as it develops its wings and prepares for takeoff.



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